Supreme Court, U.S.
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No. 00-1552

In The

Supreme Court of the United States

PEZOLD, RICHEY, CARUSO & BARKER,

Petitioner,

v.

THE CHEROKEE NATION,

Respondent.

On Petition For A Writ Of Certiorari To The Oklahoma Court Of Civil Appeals

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Oklahoma appellate court correctly held that a federally recognized Indian tribe may not be assessed attorney fees in a state district court action where the tribe had not waived its sovereign immunity, and the court action itself was dismissed.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the Cherokee Nation, by and through A. Diane Hammons, Director of the Justice Department of the Cherokee Nation, respectfully requests that this Court deny issuance of a Writ of Certiorari to review the decision of the Oklahoma Court of Civil Appeals.

OPINION BELOW

The published opinion of the Oklahoma Court of Civil Appeals is recorded at *Pezold, Richey, Caruso & Baker v. Cherokee Nation Industries, Inc.*, 18 P.3d 364, 2001 OK CIV APP 13.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Pezold, Richey, Caruso & Barker (hereinafter "Law Firm") sued the Cherokee Nation (hereinafter "Nation") in a state district court in an attempt to recover attorney fees it claimed were owed based upon alleged representation of the Nation during the tenure of Joe Byrd as principal chief. The Nation entered a special appearance and moved to dismiss based upon sovereign immunity, which the state district court denied. After this Court's

decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.3d.2d 981 (1998) the Law Firm agreed to a dismissal without prejudice but continued its assertion that it was due attorney fees based upon alleged violations by the Nation during the discovery process. The state trial court agreed with petitioner, and assessed costs against the Nation in the amount of $32,688.50 as fees and costs resulting from the alleged discovery violations. The Nation appealed, and the Oklahoma appellate court reversed the lower court's order holding that the Nation's sovereign immunity protected it from the assessment of costs. The Oklahoma Supreme Court denied certiorari.

SUMMARY OF THE ARGUMENT

The Court of Civil Appeals correctly held that the Cherokee Nation's sovereign immunity protected it from fees and costs assessed in a state district court action which was ultimately dismissed based on its initial special appearance and plea of sovereign immunity. The petitioner now asks this Court to grant certiorari review to review the propriety of the state appellate court's decision.

REASONS FOR REFUSING TO GRANT THE WRIT

I. THE STATE DISTRICT COURT'S IMPROPER IMPOSITION OF FEES AGAINST AN INDIAN TRIBE DOES NOT PRESENT A FEDERAL QUESTION "BETWEEN A COURT'S INHERENT AUTHORITY AND THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY."

Petitioner Law Firm disagrees with the decision of the Oklahoma appellate court, and asks this Court to act as a super-appellate court and review the state court's ruling. In so doing, Law Firm attempts to characterize the trial court's imposition of costs against the Nation as an exercise of "inherent authority" which, Law Firm claims, is in conflict with the doctrine of tribal sovereign immunity.

In assessing costs against the Nation, the Tulsa County district judge did not allege that he had the power to do so, in the face of tribal sovereign immunity, because of his "inherent judicial authority." Indeed, he did not address the basis for his ruling at all. Appendix B, Petition for Writ of Certiorari, p. 8a. The same judge had previously overruled the Nation's motion to dismiss based upon sovereign immunity.

Under Title 12, Okla.Stat., § 3237(A)(4), the district court may award expenses, including attorney fees, for discovery violations. Thus, the district court may have been acting under a specific statutory provision of state law, and not acting under its inherent or supervisory judicial power. Ordinarily, in Oklahoma, attorney fees may not be recovered in the absence of an agreement or

statutory authority. *Globe & Republic Insurance Co. v. Independent Trucking Co.*, 387 P.2d 644 (Okla. 1963). However, when a litigant has acted in bad faith, wantonly or for an oppressive reason, the trial court may, in the exercise of its inherent equitable powers, award attorney fees. *City National Bank & Trust Co. v. Owens*, 565 P.2d 4 (Okla. 1977). Here, the district court's order did not recite any finding of bad faith or wanton or oppressive conduct. Appendix B, Petition for Writ of Certiorari, p. 8a. Therefore, the Oklahoma Court of Civil Appeals could have held that the district court's imposition of fees was statutorily based, and was not an exercise of inherent authority. As such, it was clearly overridden by the Nation's sovereign immunity.

The Oklahoma appellate court, in making its determination that the Tulsa district court improperly imposed fees against the Nation held that, under *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), the Nation was protected by sovereign immunity from a "**state** court's exercise of inherent powers." Appendix A, Petition for Writ of Certiorari, p. 5a, emphasis added. This was not a departure of law, and was clearly mandated by the long line of federal and Oklahoma cases recognizing tribes' sovereign immunity.

As the Oklahoma Supreme Court recently reiterated in *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*, 2 P.3d 338, 2000 OK 27 (Okla. 2000), "The doctrine of res judicata is a state-created one. . . . State res judicata jurisprudence is, however, as is all state-created law, subordinate to federal constitutional principles, e.g., due process. Id. To here allow state judicial intrusion into the sovereign tribal

coffers by reason of the state procedural doctrines of res judicata or collateral estoppel would clearly diminish the federally mandated sovereign immunity by reason of state law, contrary to *Manufacturing*." The State's highest court ruled that the state law principles of res judicata and collateral estoppel could not overcome sovereign immunity. Thus, the intermediate appellate court's ruling here that a state award of attorney fees could not overcome sovereign immunity was sound.

II. THE STATE COURT'S RULING DID NOT EXTEND THE HOLDING IN *KIOWA*, AND WAS MERELY A REITERATION OF WELL ESTABLISHED PRINCIPLES OF SOVEREIGN IMMUNITY.

In its second reason for granting the writ, Law Firm attacks Indian sovereignty, calling it a "judicially created doctrine," and argues that the state appellate court extended the notion of sovereignty "so broad as to eliminate any authority of the courts to punish misconduct by an Indian tribe that appears before them." Petition for Writ of Certiorari, p. 8. First, a court may punish misconduct by any Indian tribe that is properly before it as a result of a waiver of sovereign immunity. Second, it must be noted that the same argument was made against the United States in the decision of *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994). The First Circuit rejected that argument, noting that the court still maintained control over attorneys appearing before it, and could sanction them. 29 F.3d at 766-767.

The inherent sovereignty of Indian tribes was not created by the United States courts, nor by any courts. "Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 507 (1991).

United States courts have recognized sovereignty, but did not create it. Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 2620-2621, 53 L.Ed.2d 667 (1977). This aspect of tribal sovereignty is subject to the superior and plenary control of Congress. Without congressional authorization, the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co.*, supra, 309 U.S., at 512, 60 S.Ct. at 656.

In the Tulsa County case, the Nation was exempt from suit, as it maintained from the beginning of the litigation. Had the state district court correctly followed the law, and dismissed the suit immediately based on sovereign immunity, there would have been no discovery violations. The Nation was exempt from suit, and it was correspondingly exempt from any award of attorney fees. Law Firm should not have been allowed to collect from the back door what it could not from the front door. This

premise is not novel. Except to the extent it has waived its immunity, the United States Government is immune from claims for attorney's fees. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S.Ct. 3274, 3278, 77 L.Ed.2d 938 (1983). Waivers are strictly construed in favor of the sovereign. Here, the Nation did not waive its sovereign immunity to be sued, nor to have fees assessed. The Oklahoma appellate court was correct in holding that sovereign immunity barred the imposition of fees against the Nation.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari because no new questions of federal import are involved, the Oklahoma appellate court merely applied long-standing principles of law enunciated by this Court.

Respectfully submitted,

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